

SOUTH AFRICA / JUDGMENT

G[....] and Another v Road Accident Fund (30751/2015) [2020] ZAGPPHC 593 (16 October 2020)

[2020] ZAGPPHC 593

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

30751/2015

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Case

Number: 30751/2015

In

the matter between: G[....],
 DD
 1st
 Plaintiff
 G[....],
 MD
 2nd Plaintiff
 and
 THE
 ROAD ACCIDENT
 FUND
 Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] During 2015 the first plaintiff, in her capacity as the mother and natural guardian of her son, D[....] G[....] (“second plaintiff”), born on 15 September 2015, instituted an action against the defendant, a juristic person in terms of the provisions of Act 56 of 1996 (“the Act”) pursuant to a collision between a motor vehicle bearing registration number [....] and Aa donkey cart on which the plaintiff was a passenger. The collision

occurred on 08 February 2014 on the Dominionville turnoff, Wolmaranstad, Klerksdorp.

[2] As the second plaintiff has reached the age of majority, he has been substituted for the first plaintiff.

[3] Hereinafter I will refer to the second plaintiff as ‘the plaintiff’.

[4] As a result of the collision the plaintiff sustained the following injuries:

4.1 polytrauma with abrasions and bruises;

4.2 acute abdomen with ruptured spleen;

4.3 fractures of the superior rami on the left and right sides with an acetabular fracture of the pelvis;

4.4 mild to moderate diffuse concussive brain injury.

[5] On 8 August 2018 an order was granted in terms of which the issue of merits and general damages were settled. The defendant was ordered to the sum of R600,000.00 as general damages. The defendant has also given an undertaking in terms of s 17(4)(a) in respect of 100% of the costs of future accommodation of the plaintiff at a hospital or

nursing home or treatment of or rendering of a service or the supply of goods. Further, the issues of past and future loss of earnings as well as past hospital, medical and related expenses were postponed to 03 March 2019 for a determination.

[6] The plaintiff and the defendant have filed their experts' reports. Further, the parties have prepared the joint minutes of orthopaedic surgeons (Drs D A Birrel and N Ngcoya) and the industrial psychologists (Ms E Noble and Ms c Cilliers). However, on the day of the trial, the joint minute of the industrial

psychologists was not signed.

[7] The parties have also held three pre-trial meetings (06 April 2016, 15 February 2017 and 26 June 2018) where an attempt was made to narrow the issues. On 02 August 2018 the defendant delivered to a notice in

terms of uniform rule 34(1) in which it made the following offer:

7.1 that it conceded merits 100% in favour of the plaintiff.

7.2 that it would pay to the plaintiff the sum of R 600, 000.00 as general damages.

7.3 that it would pay the plaintiff the sum of R276, 351.00 for loss of earnings.

[8] On 8 August 2018 the plaintiff accepted the offers on merits and general damages and rejected the offer on loss of earnings.

[9] The matter was enrolled for hearing on 13 March 2019 for 2 to 3 days. Although the matter was allocated for hearing on that day, counsel for the defendant indicated that the matter was not ripe for hearing.

After hearing submissions from both parties, it was agreed to adjourn in order to enable the parties' industrial psychologists to prepare a joint addendum in an attempt to settle the matter. In their submissions it became apparent that the defendant was contesting the seriousness of the plaintiff's head injury and its impact on the plaintiff's capacity to work.

[10] It is the plaintiff's case that as a result of the head injury he sustained, the plaintiff has suffered loss of earning capacity and is therefore unemployable and he should be compensated for such loss. The defendant's case is that although the plaintiff suffered a mild head injury, he still retained some residual working capacity and a high contingency should be applied when assessing his loss.

[11] There was an understanding by all parties that should no agreement be reached when the hearing resumes on 15 March 2019, that the matter will be postponed.

- [12] On 14 March 2019 the defendant served the plaintiff's occupational therapist and industrial psychologist with subpoenas to appear in court on 15 March 2019. Even though the industrial psychologists had prepared a joint addendum, on the day the hearing was to resume (15 March 2019), Ms Cilliers, the defendant's industrial psychologist, informed the plaintiff's industrial psychologist that she had been instructed not to sign the joint addenda.
- [13] It also transpired that before the proceedings could resume on 15 March 2019 the plaintiff's counsel approached the defendant's industrial psychologist without the defendant's counsel's knowledge and consent.
- [14] The only issue to be determined is whether a cost order should be made for the costs occasioned by the postponement and if such order is made, the scale at which costs should be set.
- [15] It is the plaintiff's contention that the defendant should be held liable for the costs occasioned by the postponement on a punitive scale. It was submitted on behalf of the plaintiff that despite agreement between the parties that the matter was trial ready, at the last minute the defendant had reneged and for the first time was raising the issue of the plaintiff's head injury. It was further submitted that even at roll call the parties' counsel had intimated to the Acting DJP that the trial was ready to proceed hence an allocation was made. It is the plaintiff's contention that the issue of the plaintiff's head injury was a dilatory tactic. Counsel submitted that the defendant should be held liable for the wasted costs occasioned by the postponement.
- [16] On behalf of the defendant the following submissions were made. That throughout the stages of the matter, the defendant had made it clear to the plaintiff that the issue of future loss of income was in dispute and that the plaintiff would have to prove that the head injury sustained by the plaintiff has rendered him unemployable.
- [17] It is the defendant's contention that in view of the plaintiff's pre-existing cognitive difficulties which are documented and there is evidence that he was using drugs from an early stage, the plaintiff needs to prove that the head injury rendered him unemployable. It was further submitted that that even though the plaintiff knew he would have to prove his loss of earning capacity, its witnesses were not in court to testify. It was argued on behalf of the defendant that the plaintiff could not ask for a punitive cost order without first giving it notice of its intention to seek such costs. Counsel further submitted that the appropriate costs order that should be granted should be costs in the cause since the outcome of the matter would be relevant in the determination of the costs too be paid in light of the plaintiff's rejection of the defendant's offer to settle all the issues in dispute.

[18] It is common cause that when an allocation for a hearing was made, the only issue still in dispute was the award to be made with regard to the plaintiff's loss of earning capacity. From the minutes of the pre-trial meetings the parties had held, the defendant made it clear to the plaintiff's attorneys that the onus was on the plaintiff to prove that it had suffered loss of earning capacity.

[19] The fact that the defendant does not have corresponding reports, it cannot be assumed that the contents of the reports of the plaintiff's experts in those instances will be admitted without much ado. In view of the plaintiff's counsel's reliance on the alleged severity of the plaintiff's head injury in asserting that the sequelae of the injury had rendered the plaintiff unemployable and that he would be dependent on others for the rest of his life, it would still be incumbent on the plaintiff to show a link between the injury and his loss of earning capacity. Despite the fact that the

defendant's counsel failed to identify which injuries, opinions and sequelae it was disputing, I am not convinced that the

defendant's conduct has been dilatory in order to delay the finalisation of this matter.

[20] In dealing with public funds the defendant has an obligation to dispense such funds in a responsible manner. In *Madzunya and another v Road Accident Fund*[1] the court stated that"

"[17] In an unreported judgment of this Court, Road Accident Fund v Roman Klisiewicz, case no 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent's responsibilities, saying in para [42]:

'The [Road Accident Fund] exists to administer, in the interests of road accident victims, funds it collects from the public. It has a duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence.'

[21] I am therefore not convinced that a case has been made for a punitive cost order against the defendant. I am of the view that in light of the postponement, the appropriate order which should be made is as suggested by counsel for the defendant.

[22] Even if I am wrong, I am of the view that a punitive cost order would not be appropriate under the circumstances.

[23] In the result the following order is made:

1. The matter is postponed sine die.
2. Costs to be costs in the cause.

N P MNGQIBISA-THUSI

Judge of the High Court

Date of hearing: 15 March 2019

Date of judgement: 16 October 2020

For Plaintiff: Adv R Ferguson (instructed by Adams & Adams)

For Defendant: Adv K Mvubu (instructed by Nisingiza Horner Inc)

[1] 2007 (1) SA 165 (SCA).

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